



POLICE DEPARTMENT

August 4, 2015

MEMORANDUM FOR: Police Commissioner

Re: Captain Benjamin Graham  
Tax Registry No. 925379  
32 Precinct  
Disciplinary Case No. 2013-9818  
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The above-named member of the Department appeared before the Court on March 2, March 3 and March 27, 2015, charged with the following:

1. Said Captain Benjamin Graham while on-duty and assigned to the 24th Precinct, on or about August 19, 2012, in the vicinity of [REDACTED] in New York County, did cause inaccurate entries to be made in Department records in that he lowered the value of stolen property in a Complaint Report to re-classify a crime as Petit Larceny rather than Grand Larceny.

P.G. 203-05 Page 1, Paragraph 4 – PERFORMANCE ON DUTY – GENERAL

2. Said Captain Benjamin Graham while on-duty and assigned to the 24th Precinct, on or about September 3, 2012, in the vicinity of [REDACTED] in New York County, did cause inaccurate entries to be made in Department records in that he lowered the value of stolen property in a Complaint Report to re-classify a crime as Petit Larceny rather than Grand Larceny.

P.G. 203-05 Page 1, Paragraph 4 – PERFORMANCE ON DUTY – GENERAL

3. Said Captain Benjamin Graham while on-duty and assigned to the 24th Precinct, on or about August 12, 2012, in the vicinity of [REDACTED] in New York County, did cause inaccurate entries to be made in Department records in that he deleted pertinent facts from an online Complaint Report in order to warrant classifying a felony assault as a misdemeanor.

P.G. 203-05 Page 1, Paragraph 4 – PERFORMANCE ON DUTY – GENERAL

4. Said Captain Benjamin Graham while on-duty and assigned to the 24th Precinct, on or about July 26, 2012, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Captain Graham improperly re-classified, or caused to be re-classified, a Complaint Report from Grand Larceny to Identity Theft. (*Added but later dismissed on Department's motion*)

P.G. 203-10 Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT  
P.G. 203-05 Page 1, Paragraph 4 – PERFORMANCE ON DUTY – GENERAL

The Department was represented by Scott Rosenberg, Esq., Department Advocate's Office. Respondent was represented by Louis C. La Pietra, Esq., La Pietra & Krieger PC.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

Respondent is found Guilty.

### Introduction

Respondent was the executive officer of the 24 Precinct. In the latter part of 2012, the Quality Assurance Division (QAD) received a complaint from a member of the command that Respondent was downgrading crime reports to avoid having index, or "seven major," crimes on the precinct's statistics. The investigation reviewed approximately eight complaint reports over an approximately three-week period, on which Respondent had been involved in updating. Three are at issue here.

In each of the three incidents, a complaint report or '61' was taken by a police officer from a member of the public. In the normal course of events, an officer takes a handwritten or "scratch" report of the incident and classifies it as the appropriate offense. That complaint report

then is entered verbatim into the computer system and becomes the Omniform copy of the complaint report. The desk officer or other appropriate supervisor then must approve and finalize the complaint report. See Patrol Guide § 207-01, Additional Data, p. 6.

It was undisputed that there are legitimate times when complaint reports must be updated. Supervisors, however, have the ability to alter complaint reports within the Omniform system. Respondent did so in each of the three cases at issue. He claimed that he did so legitimately, and the Department disputed this.

Whether Respondent's actions were appropriate turned in large part upon the Department's Crime Complaint Reporting System Reference Guide ("RG," Department's Exhibit [DX] 12). The Reference Guide was published by the Department to assist members in classifying various kinds of incidents. The Reference Guide speaks to the issues in question here.

Two of the incidents concerned the alleged downgrading of what should have been the felony of grand larceny to the misdemeanor of petit larceny. The former has to do with whether the value of the stolen property exceeded \$1,000. See Penal Law § 155.30 (1). The Reference Guide states that when determining value of stolen property, the victim's statement on value "will be accepted in virtually all cases." Receipts are unnecessary (RG, p. 26, para. 1). If, however, the victim "obviously exaggerates the value of stolen property for insurance or other purposes," a fair market value may be used (3).

The third incident concerned the alleged downgrading of a felony-level assault to misdemeanor level. Here, the issue was whether the victim was struck repeatedly on the floor or just once. The Reference Guide gives an example of an assault that should be classified as a felony: "A perpetrator repeatedly slams his girlfriend's head against the floor causing lacerations and swelling" (p. 19). The perpetrator's action suggests the use of the floor as a dangerous

instrument – a quotidian object which, under the circumstances, is used as a weapon and elevates the assault to a felony. See Penal Law § 120.05 (2).

Assault Case: Specification No. 3

The assault case was a domestic incident to which Police Officer Jessenia Guzman responded. Both a male and a female complainant were arrested, as each physically assaulted the other. Guzman testified that she filled out a scratch copy of the complaint report and classified the crimes as misdemeanors, assault in the third degree (Department's Exhibit [DX] 4). Guzman's version of the narrative for the female complainant was based on the account given by the woman. Guzman wrote that her husband "slammed her head numerous times on kitchen floor." Guzman also prepared the arrest report, which also had the phrase "numerous times" (DX 6).

Guzman stated that she entered the '61' into the computer system. The Omniform complaint report, however, was missing "numerous times" (DX 5).

On the domestic incident report (DIR), which the female complainant filled out about an hour later once she returned from the hospital, she wrote in the victim's narrative that her husband "slammed my head down on to the kitchen floor," began to write something but crossed it out, and then wrote "very hard" (Respondent's Exhibit [RX] A, p. 2). Guzman conceded that in the officer's narrative, she simply wrote the subject "slammed her head to floor" (RX A, p. 1). The Omniform copy was consistent with both of these (RX B).

Larceny Cases: Specification Nos. 1 & 2August 19, 2012

The first theft in question was of an electric bicycle. The complainant was a delivery person for [REDACTED] and his bike was stolen from outside the store. He called the police, who responded to the store and took a report. The complainant, however, apparently was under the impression that a report was not taken and came to the 24 Precinct station house the next day. The telephone switchboard (TS) operator, Police Officer (now Sergeant) Johanna Stena, testified that the complainant brought with him a receipt for the bike, which stated a value of \$1,380.55 (see DX 8). The receipt was a carbon-type of receipt that could be used by any business. It was stamped with the name MNC International Trading Inc., and listed a [REDACTED] address and a (212) phone number. It was dated January 9, 2012. "Warranty" was handwritten at the top and the document had listings for the frame and the battery. It also listed a one-year warranty for the motor and a six-month warranty for the battery. The prices were not itemized, at least not legibly or in English; there appeared to be writing in a foreign alphabet next to some of the items and at the bottom.

Stena took a handwritten complaint report and classified the crime as a grand larceny (DX 7). She stated that normally the Complainant's Report of Lost or Stolen Property form (also part of DX 7) was filled out by the complainant, but here she did it. Stena did not know why this occurred in this instance. Stena testified that she spoke to the desk officer, Sergeant Jeanpaul Ancion, about the case but did not recall the issue of insurance coming up.

The Omniform computer-generated version of the complaint report classified the crime as a petit larceny and reduced the value to \$439 (DX 9).

September 2, 2012

The second theft was of a nonmotorized bicycle. The owner came into the 24 Precinct station house the next day and stated that his bike was taken from the hallway of his apartment building. Police Officer Sylvia Williams was the TS operator and took the handwritten complaint report (DX 1, scratch complaint report with complainant's form). The complainant filled out the Lost or Stolen Property form and valued the bike at \$1,500. He listed the make or manufacturer as "Specialized." Williams classified the crime as grand larceny. The Omniform copy of the '61,' however, classified the crime as petit larceny and valued the property at \$889.

Sergeant Giuseppe Favia was the crime analysis supervisor at the 24 Precinct. On September 4, 2012, he called Respondent and told him that QAD was at the command and wanted to see the scratch copy of the complaint report Williams filled out, among seven to nine others. Respondent told Favia that the scratch copy was in Respondent's desk. He also instructed Favia to print out a copy of a specific listing on the website of Erik's Bike Shop and include that with the materials he gave to QAD. Favia did so (DX 3, listing for "Specialized 2012 Rockhopper Base 29er Mountain Bike").

#### The Quality Assurance Division's Investigation

##### Assault

Lieutenant Michael Brill conducted QAD's investigation. As to the assault case, Brill testified that Respondent admitted in his official Department interview he changed the complaint report. He viewed the DIR and saw that the complainant did not mention "numerous times." He wanted the DIR and '61' to be consistent, so he changed the latter. While this could have been legitimate had Respondent first spoken to the arresting officer Guzman, her supervisor, or the

victim to see if "numerous times" had been placed in the scratch copy of the complaint report by accident, he did not do this.

### Electric Bike

Brill testified that Stena stated in her official Department interview that she confirmed with the desk officer, Ancion, before classifying the theft as a grand larceny. She did not speak to Respondent.

Brill conceded that Ancion said in his official interview that the complainant originally stated a value of \$700. When told, however, that this would be the value given to his insurance company, he said he had a receipt "to cover the whole amount." Brill testified that someone at the precinct asked the complainant to bring in a receipt.

Brill indicated that the officer who originally dealt with the complainant stated that he originally gave a value of \$700, and then doubled that when filling out the Complainant's Report.

Brill testified that Respondent admitted in his official Department interview (DX 10) that he changed the classification. He believed the amount stated by the victim was excessive and questioned the legitimacy of the receipt. He performed an Internet search for electric bicycles and changed the value as a result of a listing on Walmart.com. Additionally, Respondent said in his interview that he found several other electric bike thefts within the 24 Precinct where the value was \$1,000 or less.

Respondent attached the printout of the listing for an eZip Trailz bike (DX 11) to the re-classified complaint report. Brill, however, testified that he found about a dozen electric bikes for sale on Walmart.com and only perhaps four cost \$1,000 or less. Approximately two-thirds of the bikes cost more than \$1,000, and their theft would have been grand larceny.

Brill conducted a Google inquiry for the company listed on the victim's receipt, testing Respondent's claim that it was neither a legitimate receipt nor company. Brill testified, however, that multiple responses came back with listings for electric bikes at the commercial address in question.

#### Pedal Bike

Brill testified that with regard to the "regular" pedal bicycle, Williams consulted with a supervisor before classifying the crime as a grand larceny as opposed to a burglary.

Brill stated that Respondent admitted in his interview that he reclassified the '61' after re-interviewing the complainant. Respondent said that he knew something about bikes and what was said by the complainant made him think the value given was "somewhat inflated." The complainant said that he bought the bicycle in [REDACTED]. Respondent then did an Internet search, knowing that the bike was a Specialized blue and white steel-frame bike. The complainant told QAD, however, that the bike was a Specialized Camber model, not a Rockhopper.

Brill determined that Erik's Bike Shop only had brick-and-mortar stores in the Midwest. The printout provided by Respondent stated that the price was for in-store purchase only.

#### QAD's Conclusion

Brill testified that in both of the larceny cases, Respondent's downgrading of the crimes was improper because he should have accepted the victim's statement of value.



Respondent's Testimony

Respondent testified that he reviewed complaint reports on a daily basis to see if they were "properly classified." He was very "ambitious" after his arrival at the 24 Precinct in July 2012 and wanted to "do as much work for the commanding officer as I could."

Assault

Respondent noted that when he saw the "numerous times" in the '61,' he was thinking the crime needed to be upgraded to a felony due to the use of the floor as a dangerous instrument. When he saw the lack of that phrase in the other documents, however, he tried to get in touch with the arresting officer or the complainant, but both were unavailable. Respondent claimed that he had to work fast because complaints must be finalized within 24 hours (see Patrol Guide § 207-01, Additional Data, p. 6). Because QAD itself "len[t] more weight to the victim's statement than the officer's statement," he deleted the offending phrase from the '61.'

Electric Bike

Respondent testified that when he came across this '61,' it "set off a little alarm" in his mind because the value seemed high compared to other electric bike thefts from delivery persons that he had seen. He did a citywide search in the Omniform system for cases in the preceding year where electric bikes were stolen from delivery persons after the individual left it unlocked. He found five reports, and the stated values were on average between \$400 and \$700.

Respondent testified that he also spoke to Ancion to see if he knew anything about the matter. Respondent claimed that Ancion told him the victim originally stated a value of \$700, but "once they mentioned something about insurance," he "elevated" the value to \$1,400. Ancion also contended that the receipt "didn't really describe a bicycle" even though it stated

frame and battery, and the name of the company "didn't appear to be a bicycle company."

Ancion also found no results for the company on Google.

Respondent googled "electric bicycle" and found the Walmart listing. On that site, the results "fell within the range" of his prior Omniform search. He admitted that Walmart listed prices over the grand larceny threshold, but nonetheless went with the lower price based on the Omniform search.

#### Pedal Bike

Respondent testified that he used to work at a bike shop and cycled as a hobby. He conceded that bicycles often cost \$3,000 or \$4,000. Here, however, the lack of any information on the Complainant's Report other than the Specialized brand and a \$1,500 price piqued his interest. He called the complainant by phone and asked him about it. He told Respondent that he bought the bike from a shop in [REDACTED] that was closing down. The complainant did not know the year or the specific model, even when Respondent gave him some possibilities. The complainant knew that it only had shocks on the front, not the back as well, which would have meant a full suspension and thus a higher cost. It was a steel alloy frame and had the kind of brakes that engage the rim of the wheel, as opposed to the more expensive titanium and disc brakes like those found on an automobile. All told, Respondent indicated, the complainant's statements were consistent with a Rockhopper but not a Camber.

Respondent went to the Specialized website and narrowed down the complainant's description of the bike to a Rockhopper. At most such a bike would have cost \$800 or \$900. Respondent felt the victim was exaggerating the price for insurance purposes.

Findings and AnalysisAssault

The problem with Respondent's approach to the issue in the assault case was that he made unwarranted assumptions about what people at the scene meant. He was confronted with a situation where the arresting officer wrote that the suspect slammed the victim's head to the ground "numerous times." The officer testified here that this was based on the victim's statement to her. It was undisputed that the DIR, written by the victim herself, did not say "numerous times." It is not a question, however, of taking the victim's statement over the officer's. Respondent assumed that the absence of "numerous times" meant that her head was slammed only once. It did not necessarily mean that, however; it just meant that the number of times was unspecified.

Thus, there was no inconsistency among the reports. For that reason alone, the Court can put aside the question of whose report to believe. It was improper for Respondent to alter the complaint report to make it consistent with the DIR. *See Case Nos. 2012-7689 & 2013-10950*, p. 12 (Feb. 19, 2015) (it was misconduct for sergeant to persuade domestic violence victim to change her DIR to be consistent with complaint report, which portrayed suspect's assault of victim and taking of her phone as two separate events, a petit larceny and a misdemeanor assault, rather than a robbery).

Respondent asserted that he did not omit the words from the Omniform complaint and arrest reports out of a motive to avoid having to classify the crime as a felony. This is charged in the specification. His assertion, however, is inconsistent with his testimony that he originally was going to upgrade the crime to felony-level assault upon seeing the "numerous times" term. Only upon deletion of this could he classify it as a misdemeanor. Therefore, it was his motive,

notwithstanding any additional motive to harmonize the DIR with the complaint and arrest reports.

Thus, Respondent is found Guilty of Specification No. 3.

### Larceny

The problem here again is that Respondent made unwarranted assumptions about the victims' motive and character. In the electric bike case, he concluded based on multiple layers of hearsay that the complainant raised the value for insurance purposes. He discounted the possibility of a misunderstanding or language barrier. In any event, it could have been that the price of the bicycle alone was \$700 but that added items, like the battery, motor and warranty, raised the price considerably for this nearly-new bike. That would be consistent with Ancion's statement that victim had a receipt for "the whole amount. Additionally, no evidence was put forth to demonstrate that none of these other items were to be considered in determining the market value of the stolen property at the time and place of the crime. That is the determining factor under both the Department Reference Guide (p. 26, Determining Value of Property Stolen, para. 4) and the Penal Law (§ 155.20 [1]).

Respondent also concluded without sufficient basis that the receipt was fraudulent. It certainly does not appear so to this tribunal. Citizens are allowed to buy things from businesses that use old-time handwritten receipts, even from businesses that do not have websites. They also are allowed to buy bicycles from general stores that do not, to Respondent, "sound like a bike shop." Respondent's most egregious assumption, however, was that the complainant must have bought a cheaper bike because he was a delivery person. Respondent admitted that there were several electric bicycles on Walmart.com that cost over \$1,000. He gave no reasonable

explanation for why he decided the instant victim's bike must have cost less, other than that he was another delivery person.

Any of Respondent's conclusions ultimately might have been valid. The Reference Guide, however, exists specifically so that members do not engage in these kinds of investigations. They are to take the complainant's word for it unless he "obviously exaggerates" the value for insurance or other reasons. This was not obvious here. Therefore, Respondent is found Guilty of Specification No. 1.

The analysis in the pedal bike case is similar. Respondent's interest was piqued because he was a bicycle enthusiast himself. He admitted that bikes like the Specialized brand at issue here easily reach \$3,000 or \$4,000 in price. Yet he took it upon himself to interrogate the complainant into the specifics of the bike. The answers the complainant gave were not satisfactory to Respondent. Again, Respondent discounted the possibility that the victim simply did not know as much about bicycles as he did, and was only making basic guesses as to its specifications.

Respondent also thought that insurance fraud was present here because the victim left his bike in his hallway and thought his upstairs neighbor took it. New York City apartment dwellers leave their bicycles in common hallways all the time. It is a great way to become a victim of bicycle theft but it does not make one into a committer of insurance fraud. This is another instance of something purportedly being "obviously exaggerate[d]" in Respondent's mind but not so much to others, including this tribunal.

As such, Respondent is found Guilty of Specification No. 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on March 1, 2000. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

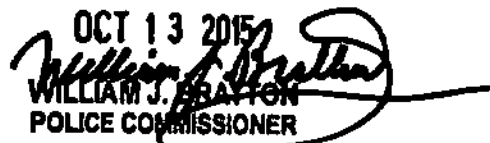
The Department recommended a penalty of the forfeiture of 20 vacation days. That is excessive here in light of Respondent's long and accomplished service to the Department. *See Case No. 2011-3639*, pp. 6-7 (Dec. 28, 2012) (15 days for two instances of downgrading larceny or burglary to criminal mischief, notwithstanding 20-day precedent for multiple instances, in light of officer's lack of prior record). Additionally, Respondent here appeared to have acted under a sincere though mistaken belief that the crimes should be classified as misdemeanors and not felonies. He was overzealous but not malicious. As such, the Court recommends that he forfeit 15 vacation days as a penalty.

Respectfully submitted,



David S. Weisel  
Assistant Deputy Commissioner – Trials

**APPROVED**

OCT 13 2015  
  
WILLIAM J. BRATTON  
POLICE COMMISSIONER

POLICE DEPARTMENT  
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
CAPTAIN BENJAMIN GRAHAM  
TAX REGISTRY NO. 925379  
DISCIPLINARY CASE NO. 2013-9818

On his last three performance evaluations, Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" once and 4.0 "Highly Competent" twice. He has been awarded one medal for Excellent Police Duty. [REDACTED]

[REDACTED]  
Respondent has no prior formal disciplinary record.

For your consideration.



David S. Weisel  
Assistant Deputy Commissioner – Trials